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IN RE SATERAS RESOURCES (MALAYSIA) BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[PETITION NO: D5(D4)-26-79-2004]
31 JANUARY 2005

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COMPANY LAW: *Arrangement, scheme of - Court approval - Whether scheme should be approved or sanctioned by court*

The petitioner sought the High Court's sanction for a scheme of arrangement and compromise ('the proposed Scheme') pursuant to s. 176(3) and (4) of the Companies Act 1965 ('the Act'). The interveners opposed the petition on *inter alia* the following grounds: (i) the petitioner's Explanatory Statement was misleading, inaccurate and did not contain sufficient information to enable the creditors and shareholders to make an informed decision; (ii) the petitioner failed to ensure that different categories of creditors with different interests and rights were properly constituted when calling for the meeting of Scheme Creditors to consider and vote on the proposed Scheme; (iii) the Creditors Meeting held on 10 September 2004 was null and void.

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Held (dismissing the petition with costs):

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[1] Generally, the court should be slow in interfering with the decision of the majority of the creditors in the creditors meeting. Businessmen are much better judges of what is to their commercial advantage rather than the court. However, the court may interfere if there is anything wrong or there has been some material oversight or miscarriage on their part. (p 202 a-b)

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[2] In the instant case, the court was satisfied that insufficient information was provided in the Explanatory Statement and the creditors were not in a position to make correct assessment of the matters, given the time constraint, to support or to oppose the proposed Scheme. The majority of the creditors did not even have the advantage of the required 21 days notice. There was no reliable evidence adduced by the petitioner to show that such notices were actually sent to all the creditors 21 days before the meeting (pp 20-21). The authenticity of the list of creditors provided by the petitioner was also questionable. (p 204 f-g)

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[3] The claim by the petitioner that the proposed Scheme had obtained overwhelming approval was clearly misleading. It was only about 6.79% of the total shareholders in value who attended and voted in the meeting and about 5% of the issued and paid up share capital of the petitioner was owned by the promoter of the proposed Scheme. The majority of the shareholders were not represented due to the fact that the meeting was not properly called. In the creditors meeting, more than 50% of the total debts were represented by the subsidiaries of the petitioner. This certainly could not constitute overwhelming approval of the creditors. (p 205 b-c)

[4] The petitioner's Explanatory Statement did not reflect a true and fair view of the state of affairs of the petitioner. The Explanatory Statement failed to disclose, explain or provide any information on the fate of the residual underlying assets of the petitioner. The Explanatory Statement was incomplete as at least one litigation against the petitioner had not been listed. The outstanding sum owing to the petitioner's subsidiaries as listed was also not accurate. The Explanatory Statement did not disclose the material assets of the petitioner's group. (pp 205 g-h & 206 a-f)

[5] A creditor needs to have information which bears upon his chances of obtaining a better deal than the one being offered under a proposed Scheme. The creditors need to have in their possession sufficient facts to enable them to make a sensible commercial judgment in their own interest whether it is better to go along with the proposed Scheme or otherwise. What is commercially viable for them can only be judged after a full appreciation of the relevant facts and a full consideration of what their chances are if another avenue of recoupment, namely, through a winding-up, is followed. The court must therefore be careful about the adequacy and fairness of the information in the Explanatory Statement. The independent scrutiny of the court should ensure full and fair disclosure of all relevant materials for the benefit of the scattered and disorganised creditors whose debts are often for relatively small amounts and who are usually not in a position to discover the truth about the proposed Scheme or the prior financial position of the petitioner and its group. On the facts in the instant case, the High Court was satisfied that it was unsafe to approve the proposed Scheme in view of the failure on the part of the petitioner to disclose and make available in good time all the relevant information. (pp 207 g-h, 208 d & 209 a)

[6] It was essential for the petitioner to hold separate meetings between the different classes of creditors. In the present case, on 10 September 2004 the petitioner had convened only one creditors meeting grouping the petitioner's secured creditors, unsecured creditors together with the petitioner's subsidiaries. The amount purportedly owing to the petitioner's subsidiaries was more than 50% of the total debts owed by the petitioner. The court was of the view that it would be highly unfair to group the petitioner's subsidiaries in the same class of creditors with the petitioner's unsecured creditors as there was a divergence of interest between the petitioner's subsidiaries and the other unsecured creditors. By lumping the subsidiaries with the other creditors, the petitioner had effectively deprived the other creditors of a meaningful voice in the voting for the proposed Scheme, thereby depriving the other creditors of their legitimate rights against the petitioner. (p 209 e-g)

[7] Before the court could approve the proposed Scheme, the court had to be fully satisfied that sufficient provisions were made for deductions for KWSP contributions and Income Tax. In the present case, the proposed Scheme failed to provide for such provisions. (p 212 b)

[8] It was clear that the creditors meeting held on 10 September 2004 was not properly called and convened. Therefore the High Court would hold the said creditors meeting null and void. The proposed Scheme could not be approved by the court as petitioned by the petitioner. (p 212 g)

Case(s) referred to:

GSR Ltd [2003] FCA 82 ***(refd)***
Hiberman Friendly Society (NSW) Ltd [2002] FCA 913 ***(refd)***
Phosphate Co-operative Co of Australia Pte Ltd Shears [1989] VR 665 ***(refd)***
Re Dorman, Long & Company Ltd [1934] Ch 635 ***(refd)***
Re English Scottish & Australian Chartered Bank [1893] 3 Ch 385 ***(foll)***
Re Halley's Departmental Store Pte Ltd [1996] 2 SLR 70 ***(refd)***
Re Hellenic & General Trust Ltd [1975] 3 All ER 382 ***(refd)***
Re Phean Pty Ltd 11 ACLR 142 ***(refd)***
Re South China Strategic Ltd [1996] 4 HKC 182 ***(refd)***
Sovereign Life Assurance Co v. Dodd [1892] 2 Q 573 ***(foll)***
Sri Hartamas Development Sdn Bhd v. MBf Finance Bhd [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 HC ***(foll)***
UDL Holdings Ltd & Ors [2002] 1 HKC 172 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 176(3), (4), 177(1)(a)
Employees Provident Fund Act 1991, s. 43(3)
Income Tax Act 1967, s. 112(i)

Other source(s) referred to:
Buckley on the Companies Act, 14th edn 1981, pp 473-474
Companies Winding-Up Handbook, MLJ Handbook Series, p 161
Mallal's Digest Volume 3, 4th edn 1997 reissue, paras 18-24

Reported by Andrew Christopher Simon

JUDGMENT

Ramly Ali J:
The petitioner (Sateras Resources (Malaysia) Bhd. is seeking sanction of this court for a scheme of arrangement and compromise between the petitioner and it's shareholders and creditors (Proposed Scheme) pursuant to ss. 176(3) and 176(4) of the Companies Act 1965. The Proposed Scheme is as set out in the Petitioner's Explanatory Statement to Shareholders and Scheme Creditors and Circular to Shareholders dated 18 August 2004.

Proposed Restructuring Scheme
The principal terms of the Proposed Restructuring Scheme are as follows:

(a) proposed acquisition of 4,500,000 ordinary shares of RM1 each in Ace, representing the entire issued and paid-up capital share capital of Ace, by Salwan Corporation (Salwan) from the vendors of Ace for a purchase consideration of RM140,000,000 to be satisfied *via* the issuance of 140,000,000 new Salwan shares at par;

(b) proposed acquisition of a parcel of a 62-year leasehold land held under PN 3940, Lot No. 24, Town of Petaling Jaya, District of Petaling, State of Selangor Darul Ehsan, by Salwan from AAPSB for a purchase consideration of RM33,600,000 to be satisfied *via* the issuance of 9,000,000 new Salwan shares at par and RM24,600,000 nominal value of RCSLS at 100% of its nominal value;

(c) proposed share exchange of the entire issued and paid-up share capital of the petitioner of RM200,840,538 comprising of 200,840,538 Sateras shares with 2,000,000 new Salwan shares to be issued at par on the basis of one (1) new Salwan share for approximately every one hundred (100) existing Sateras shares held, *via* a scheme of arrangement between the petitioner and its shareholders under s. 176 of the Act;

(d) proposed settlement of debt whereby debts owing by the petitioner to its Scheme Creditors are to be satisfied *via* the issuance of 15,000,000 new Salwan shares to be issued at par;

(e) proposed placement of up to 15,000,000 Salwan shares by Salwan, on behalf of the Scheme Creditors and a minimum of 24,500,000 Salwan shares by the Vendors of Ace to meet the public shareholding spread requirement pursuant to the Listing Requirements;

(f) proposed disposal of the petitioner by Salwan to a special purpose vehicle (SPV) for a cash consideration of RM1; and

(g) proposed transfer listing with the de-listing of the petitioner from the official list of the main board of Bursa Malaysia Securities Berhad ("Bursa Securities") and the listing of Salwan in place of the petitioner on the main board of Bursa Securities.

In brief, the effect of the Proposed Scheme on the creditors can be summarized as follows:

(i) The petitioner will be sold for RM1 and in exchange of the listing status of the petitioner, Salwan will pay a sum of 6.5 sen to every ringgit owed to each of the petitioner's creditor and issue one (1) new Salwan share for every one hundred (100) shares of the petitioner;

(ii) Upon the completion of the Proposed Scheme, the petitioner will be free from all its debts and yet would continue to have substantial assets in the form of shares in various subsidiaries and claims against the various vendors arising from profit guarantees and/or warranties given to the petitioner up to the tune of about RM120 million.

In compliance with s. 177 of the Companies Act 1965 and pursuant to court orders dated 29 July 2003, 3 November 2003, 10 February 2004 and 11 August 2004 granting the petitioner leave to convene the Scheme Meetings, the Scheme Meetings were convened on 10 September 2004 among the Shareholders and Scheme Creditors. The results of the said meetings as claimed by the petitioner are as follows:

(a) 48 of the 54 Shareholders representing 99.4% in value of the Shareholders present and voting approved the Propsed Share Exchange; and

(b) 32 of the 41 Scheme Creditors representing 98.8% in value of the Scheme Creditors present and voting representing approved the Proposed Settlement of Debt.

Opposition To The Proposed Scheme

The following parties (interveners) opposed the petition:

(i) Sothilingam a/l K. Subramaniam

(ii) Messrs. Ganesan K & Muhammad Ashri

(iii) Messrs. Nik Saghir & Ismail

(iv) Bank Pertanian Malaysia (BPM)

(v) Md. Hussain bin Ibrahim

(vi) Syed Ahtha bin Syed Idris

(vii) Ee Ching Boon

(viii) Soong Yoke Moi

(ix) Kumpulan Wang Simpanan Pekerja (KWSP)

(x) Lembaga Hasil Dalam Negeri (LHDN).

These interveners are creditors of the petition. They opposed the petition primarily on the following grounds:

(i) the Petitioner's Explanatory Statement is misleading, inaccurate and does not contain sufficient information to enable the creditors and shareholders to make an informed decision from;

(ii) the petitioner has failed to ensure that different categories of creditors with different interests and rights were properly constituted when calling for the meeting of Scheme Creditors to consider and vote on the Proposed Scheme on 10 September 2004;

(iii) the Creditors Meeting held on 10 September 2004 was null and void on the following grounds:

(a) the meeting of creditors was participated and voted by subsidiaries who are not genuine creditors;

(b) the meeting of creditors was participated and voted upon by a subsidiary Development Securities Sdn. Bhd., which had been wound up on 30 June 2004;

(c) the scheme was voted upon by the promoters of the scheme namely Central Concrete Products Sdn. Bhd., being the only major shareholder owning approximately 5% of the shares in the petitioner and therefore it is tainted with biasness, not transparent and bad corporate governance;

(d) more than 50% in value of the scheme creditors comprise of subsidiaries;

(e) two individuals, namely Brig Jen (B) Dato' Haji Mohamad Nordin and Mohamad Isa bin Mohamad Nordin listed as having attended or given proxies to vote at the meeting were undischarged bankrupts;

(f) the appointment of proxies of the undischarged bankrupt and the wound-up company are defective and their presence as proxies at the scheme meeting has affected the outcome of the meeting;

The petitioner contends that the Proposed Restructuring Scheme will address the financial predicament of the petitioner which will benefit it's shareholders and creditors as Salwan, which will eventually assume the listing status of the petitioner *via* the Ace Group which is profitable and viable, will provide the shareholders and creditors an avenue to recover part of their investments or debts in the future.

The interveners, on the other hand contend that the main reason why the interveners oppose the petition is because the Proposed Scheme which the petitioner claims will benefit the shareholders and creditors is in reality a blatant outright scheme to improperly deprive the creditors of a much higher return than 6.5 sen to a ringgit.

To the interveners, the Proposed Scheme appears to facilitate the "looting" of substantial assets and receiviables of the petitioner, Sateras. The interveners allege that the most significant act of improper deprivation and confiscation for rights if the Proposed Scheme is approved by this court is the sale of Sateras at the completion of the Scheme for a privicely sum of RM1 to as so-called special purpose vehicle (SPV), one Opal Pyramid Sdn. Bhd. which has a paid up capital of RM2. By then, Sateras will become a wholly-owned subsidiary of Salwan and be totally debt free. The interveners also stressed that Sateras, at that time, still has various receiviables, claims and/or assets amounting to about RM120 million.

The Function Of The Court

The principles by which the court is guided when it considers a petition under s. 176(3) & (4) of the Companies Act 1965 are set out in "*Buckley on the Companies Act"*, 14th edn, 1981, pp. 473-474:

> In exercising its power of sanction the Court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonable approve.
>
> The Court does not sit merely to see that the majority are acting *bona fide* and thereupon to register the decision of the meeting, at the same time, the Court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.

In *Re Halley's Departmental Store Pte. Ltd.* [1996] 2 SLR 70, the Singapore High Court in approving the above passage in Buckley Companies Act, held that the court will not merely act as an overseer of *bona fides* though it is slow to differ from the views of the meeting, unless the class has not been properly consulted or the meeting has not properly considered the interest of the class. Selvam J, at p. 74 said the following:

> In an application for approval of a scheme of arrangement under s. 210 (equivalent to s. 176) of the Act, the primary question the Court must ask is whether the proposed arrangement is a fair one. In effect this means that the scheme of arrangement must be of some real benefit to the creditors and not result in the creditors getting nothing or nearly nothing or the creditors being deprived of a legitimate advantage they would get by winding-up the company. The Court should not put its imprimatur on what in effect is a scheme of confiscation of the rights of some minority unsecured creditors.

The Federal Court of Australia in the case of *Hiberman Friendly Society (NSW) Limited* [2002] FCA 913 had stated that:

> Nevertheless, the Court is not a mere rubber stamp and it will look at the arrangement to ensure that it is a reasonable one. If the Court concludes that there is an objection to the arrangement, such that a reasonable person might not approve it, then the Court may refuse to approve the arrangement. The Court must be satisfied that the proposal is at least so fair and reasonable that an intelligent and honest person who is a member of the class of the security holders bound by the arrangement acting alone in respect of his or the interest, as such security holder might approve it.

Generally, the court should be slow in interfering with the decision of the majority of the creditors in the creditors meeting. Businessmen are as much better judges of what is to their commercial advantage than the court could be. However, the court may interfere if there is anything wrong or there has been some material oversight or miscarriage on their part. This principle was enunciated as early as in 1893 in the case *Re English Scottish & Australian Chartered Bank* [1893] 3 Ch 385, where it was held:

> ... While, therefore, I protest that we are not to register their decision, but to see that they have been properly convened and have been properly consulted, and have considered that matter from a proper point of view, that is, with a view to the interests of the class to which they belong and have empowered to bind the Court ought to be slow to differ from them. It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to show that there has been some material oversight or miscarriage.

This principle was followed by Siti Norma Yaakob J in *Sri Hartamas Development Sdn Bhd. v. MBF Finance Bhd.* [1990] 1 CLJ 827; [1990] 3 CLJ (Rep) 106 where it was held that the court may overrule the decision of the majority "if there has been some material oversight or miscarriage on their part."

In the present case, applying the same principle, the court has to scrutinise the facts and circumstances of the case carefully in order to be satisfied that the Proposed Scheme was properly tabled and voted at the Creditors Meeting on 10 September 2004; that the said Creditors Meeting (held on 10 September 2004) was properly convened in accordance with the relevant laws. The court has also to be satisfied that the Proposed Scheme is fair and reasonable that "an intelligent and honest person who is a member of the class of the creditors bound by the arrangement acting alone in respect of his interest, as such creditors might approve it." For that purpose, the court has to see that the relevant provisions of the Companies Act 1965 have been complied with; that the class of creditors was fairly represented by those who attended the meeting; that the majority are acting *bona fide* and are not coercing the minority in order to promote interests adverse to those class whom they purport to represent. The court has also to be satisfied that there was proper corum and proxies attending the meeting; full and material information must relating to the assets and liabilities of the company must be communicated to all the creditors (in the form of Explanatory Statements) together with the relevant notice calling for the meeting, at least 21 days before the date of the meeting. In cases where it involved payments to KWSP and LHDN, the court has to be satisfied that sufficient provisions are made in the Proposed Scheme for such payments.

It is trite principle of company's operation that in cases where the company is insolvent, the interest of creditors and debenture holders is the paramount consideration. It overrides all other interest including the interest of the shareholders. In ordinary case, the creditors may proceed to initiate winding-up proceedings against the company where the court will appoint liquidator to liquidate all assets of the company for the purpose of settlement of debts owed to the creditors. Other creditors may file their proof of debts. For that purpose, all assets and other receiviables of the company will be taken into account.

However in the present case, the petitioner proceeded with the Proposed Scheme. As far as the creditors are concerned, the Proposed Scheme will obviously affect their interest ie, the creditors will only get 6.5 sen for every Ringgit of the debts owed by the petitioner (Sateras) to them. That payment to the creditors (6.5 sen for every Ringgit of debt) is to be considered as full and final settlement of the debt after the completion of the Proposed Scheme. In other words, after being paid 6.5 sen to every Ringgit of the debts, the creditors shall have no further recourse against the petitioner as the debts are considered fully settled. Upon the completion of the Proposed Scheme, the petitioner will be free from all debts, and yet (as claimed by the creditors) would continue to have substantial assets in the form of shares in various subsidiaries and claims against various vendors arising from profit guarantees/ warranties given to the petitioner up to the tune of about RM120 million. Under the circumstances, the creditors have solid ground to oppose the Proposed Scheme, or at least to be furnished with full information relating to all assets and liabilities of the petitioner for their considerations and decision in the Creditors Meeting. This involves information on all receivables that the petitioner may receive in the future. The creditors may want to know how the figure "6.5 sen to every Ringgit" is arrived at. It must be based on the total assets and receivables of the petitioner as well as the total liabilities. Only with these information, can the creditors consider and decide whether the support or to oppose the Proposed Scheme.

The court shall not act as a mere rubber stamp to endorse the Proposed Scheme eventhough the petitioner claimed that it has "fully complied with the statutory requirements under the Companies Act 1965" and that 98.8% (in value) of the creditors present and voting approved the Proposed Scheme.

Creditors Meeting On 10 September 2004

The court shall now deal with the creditors meeting held on 10 September 2004.

The petitioner claimed that it has fully complied with the statutory requirements applicable to a scheme of arrangement and compromise under the Company Act 1965, particularly s. 177. A written notice dated 18 August 2004 (together with a form of proxy and the rules of meeting) accompanied by the Explanatory Statement were sent to the creditors by ordinary post on 18 August 2004 and it was also advertised in the Berita Harian and the New Straits Times both on 18 August 2004, which the petitioner claimed, is more than 21 days for the meeting held on 10 September 2004.

Section 177(1)(a) of the Company Act 1965 provides that where a meeting is summoned under s. 176, there shall, with every notice summoning the meeting which is sent to a creditor or shareholder, be sent also a statement explaining the effect of the compromise and arrangement. The information or statement must include all matters relating to the assets and receivable as well as the liabilities of the petitioner. This is important to ensure that the creditors, who will be deprived of certain portion of debts owed to them by the petitioner, can make full and fair decision on the matter during the meeting. This information must be given at the same time when the notice calling for the meeting sent to the creditors ie, at least 21 days before the date of the meeting.

In the present case, the court is satisfied that insufficient information was provided in the Explanatory Statement and the creditors were not in a position to make correct assessment of the matters, given the time constraint, to support or to oppose the Proposed Scheme. The majority of the creditors did not even have the advantage of the 21 days notice. There is no reliable evidence adduced by the petitioner to show that such notices were actually sent to all the creditors 21 days before the meeting. The alleged proof of posting produced by the petitioner only indicates as "Akuan Penjualan" ("Acknowledgement of Sale") which has nothing to do with proof of posting. The authenticity of the list of creditors provided by the petitioner in exh. A3 of the petitioner's affidavit in reply is questionable. The typefaces of the various pages comprising the entire list are inconsistent. The information like the amount of outstanding balance, date of posting, or date of acknowledgement by the respective creditors have been either excluded, omitted or deliberately obliterated from the respective pages. The list does not show any semblance of order either alphabetically or by way of classification of classes, or amounts or allocation or even numerical order. This raises doubts as to whether the list is even complete and comprehensive; whether the list is genuine or not and whether all the notices were even sent out. The petitioner does not even appear to know

and therefore has not stated and numbered the total number of creditors involved in the list attached. The list may be added to or reduced without any one noticing.

The claim by the petitioner that the Proposed Scheme had obtained overwhelming approval is clearly misleading. It was only about 6.79% of the total shareholders in value who attended and voted in the meeting and about 5% of the issued and paid up share capital of the petitioner is owned by the promoter of the Proposed Scheme namely Central Concrete Products Sdn. Bhd., which shows that the majority of the shareholders were not represented due to the fact that the meeting was not properly called. Whereas, in the Creditors Meeting, more than 50% of the total debts was represented by the subsidiaries of the petitioner and this certainly cannot be adduced as having overwhelming approval of the creditors. In fact it is more of a "self-approval" as they are deemed to have community of interests.

Non-disclosure Of Assets Of The Petitioner In The Explanatory Statement

The Proposed Scheme involves *inter alia* the sale of the petitioner (Sateras) (which has a book value of RM169 million according to the audited accounts of the petitioner for the financial year ended 2003) for a token sum of RM1 to a special purpose vehicle (SPV) created by Salwan, after all the admitted debts of the petitioner as set out in the Explanatory Statement are compromised and deemed settled. The Explanatory Statement however does not contain a proforma statement as to the financial position of the petitioner, subsequent to 31 March 2003 to show the impact if the Proposed Scheme is approved and implemented and the impact if the Proposed Scheme is not implemented. The creditors who are asked to make substantial sacrifices are entitled to know at least the current financial position of the petitioner and also the subsequent position after the Proposed Scheme is approved and implemented.

Upon perusing the Explanatory Statement, it is apparent that it does not reflect a true and fair view of the state of affairs of the petitioner. The Explanatory Statement fails to disclose, explain or provide any information on the fate of the residual underlying assets of the petitioner (upon the competition of the Proposed Scheme). The Explanatory Statement is incomplete as at least one litigation against the petitioner ie, the litigation involving one Mr. Ee Ching Boon against the petitioner in Kuala Lumpur Sessions Court Guaman No: 52-12-1259-2003 has been omitted in the section "Material Litigation" at p. 118 onwards of the Explanatory Statement. The outstanding sum owing to the petitioner's subsidiaries as listed in the Explanatory Statement may not be accurate as there appear to be a case of "double counting" of creditors.

The Explanatory Statement, particularly at p. 31, does not disclose the following material assets of the petitioner's group:

(i) the estimated net realisable value of the properties of M.K. Associates Sdn. Bhd. a wholly owned subsidiary of the petitioner which has surplus assets;

(ii) the estimated net realisable value of properties of M.K. Golf Resort Bhd, as wholly owned subsidiary of M.K. Associates Sdn. Bhd., where both these companies own in total approximately 620 acres of land including a golf course in operation and generating a cash surplus each month and continuing;

(iii) the estimated net realisable value of the 45% equity interest the petitioner has in Kolej WIT Sdn. Bhd. which is now being operated profitably and with ample cash surplus each year and with surplus net assets;

(iv) the estimated net realisable value of the shares owned by the petitioner in Goon Institution Sdn. Bhd., a wholly owned subsidiary which currently generates a positive cashflow for the petitioner;

(v) the estimated net realisable value of the debt due from L.K. Ooi Development Sdn. Bhd. to M.K. Asociates Sdn. Bhd. which is well-secured;

(vi) the estimated net realisable value of debt due from Magpa Promoperties Sdn. Bhd.;

(vii) the estimated net realizable value of warranties given by:

(a) the vendors of Goon Institution Sdn. Bhd. in respect of profits;

(b) the vendors of M.K. Associates Sdn. Bhd. in respect of profits and the net asset value of M.K. Associates Sdn. Bhd. on the date of completion.

The exclusion of these asset values would certainly deprive the creditors from receiving a return much more or well above the proposed 6.5 sen to a Ringgit as settlement of the debts. The petitioner is entitled to put forward a scheme provided that all material information and asset values of the entire group (particularly the petitioner and its subsidiaries) must be taken into account before reaching any conclusion. The importance of this issue had been stressed by Selvam J in *Re Halley's Departmental Store Pte. Ltd. (supra)* when he ruled:

> since section 210 did not lay down any matters on which the application must be based, it was of extreme importance that the company furnish full information to the creditors and the Court before they could give their approval.

This point was also stated by Mougham J in *Re Dorman, Long & Company Ltd.* [1934] Ch 635 at p. 657 as follows:

> ... it is essential to see that the explanatory circulars sent out by the board of the company, are perfectly fair and, as far as possible, give all the information reasonably necessary to enable the recipients to determine how to vote.

The Federal Court of Australia in the case of *GSR Limited* (2003) FCA 82 (7 February 2003) has also stressed on the importance of sufficient disclosure of material facts to "those persons and entities who will be affected by the scheme of arrangement, of its detail and effects."

A creditor voting on a scheme is not required to act altruistically and sacrifice what he conceives to be his own interests to the interests of others or of the petitioner, although of course he may do so if he chooses. The law proceeds on the basis that a creditor is entitled to consult his own interests, and in considering what is material for the purposes of the Explanatory Statement or the conduct of the Creditors Meeting or any purpose relating to the consideration of the Proposed Scheme, one must always bear this in mind. If the petitioner or the Promoters of the Proposed Scheme mistakenly formed the view that certain consideration is not material when in fact it is, that mistake cannot conclude the matter. If a fact would tend to influence a sensible creditor's decision on whether the Proposed Scheme is in his interest or not, then it is "material" for the purpose of the approval.

(see: *Phosphate Co-operative Co. of Australia Pte. Ltd., Shears* [1989] VR 665).

What a creditor needs to have is information which bears upon his chances of obtaining a better deal than the one being offered under the Proposed Scheme. The creditors need to have in their possession sufficient facts to enable them to make a sensible commercial judgment in his own interest whether it is better to go along with the Proposed Scheme or otherwise. What is commercially viable for them can only be judged after a full appreciation of the relevant facts and a full consideration of what their chances are if another avenue of recoupment, namely, through a winding-up, is followed. The court must therefore be careful about the adequacy and fairness of the information in the Explanatory Statement. As stated by Maugham J in *Re Dorman, Long & Company Ltd. (supra)* – "it was the court's duty carefully

to scrutinize complicated scheme." In *Re Phean Pty. Ltd.* 11 ACLR 142, the Supreme Court of South Australia, in dealing with the same subject matter, held:

> The objections to certain aspects of the scheme itself might have been sufficient to warrant non-approval by the Court and reference back to another meeting of the creditors. Those objections coupled with objections based on non-disclosure meant that the vote upon the scheme was vitiated by a lack of information available to creditors in order for them to make an intelligent choice between adopting the scheme on the one hand and looking to their chances upon liquidation on the other.

There has been and always will be great reluctance on the part of companies in financial trouble to disclose the truth about their embarrassing difficulties. It is natural to expect that disclosure will be kept to a minimum. The law (Companies Act 1965) requires the court to scrutinise any Proposed Scheme carefully before approval. This procedure should not be seen as idle formalities. The independent scrutiny of the court should ensure full and fair disclosure of all relevant materials for the benefit of the scattered and disorganised creditors whose debts are often for relatively small amounts and who are usually not in a position to discover the truth about the Proposed Scheme or the prior financial position of the petitioner and it's group. To borrow the words of White J in *Re Phean Pty. Ltd. (supra)* – "This information must not remain locked in the breasts of those associated with the debtor company or of the promoters of the scheme. To use another analogy, the factual cards must not be played close to the chest but laid face up on the table in good lighting condition."

In *Re South China Strategic Ltd.* [1996] 4 HKC 182, the Hong Kong High Court held as follows:

> The importance of the scheme document and its accuracy has been emphasised on a number of occasions, (see eg, Buckley Companies Acts). The importance of the accuracy of the scheme document cannot be over-emphasised. The documents are usually in a standard format but they are the only material which the shareholders and their advisers will have at their disposal. If they do not accurately portray the underlying facts, the shareholders and their advisers will be misled. Indeed, it is probably fair to say that it is quite likely that the shareholders and their advisers will decide as to whether to attend and how to vote at a meeting not at that meeting but prior thereto. Indeed they will probable decide whether to attend that meeting largely on the basis of the information provided by the company in the scheme document. It can also be said that frequently they will not attend the meeting but that is by the bye and one hopes that before proposals are put to company meetings they are properly formulated and presented.

Applying the above principle to the facts of the present case, the court is satisfied that it is unsafe to approve the Proposed Scheme in view of the failure on the part of the petitioner to disclose and make available in good time al the relevant information as raised above.

Class Of Creditors Not Properly Constituted

Separate meetings for shareholders and creditors have to be called and convened. Where there are different classes of creditors, class meetings may have to be held. Classes will be viewed as separate if their interests are so different that they will not be able to consult together with a view to their common interests. (see: *Sovereign Life Assurance Co. v. Dodd* [1892] 2 Q 573 (CA); and *Re Hellenic & General Trust Ltd.* [1975] 3 All ER 382). A Scheme will not be approved if the Promoter of the Scheme have not correctly identified the separate classes.

(see: *Companies Winding-Up Handbook, MLJ Handbook Series*, p. 161; also see: *Mallal's Digest Volume 3* (4th edn 1997 Reissue – paras 18-24).

It is therefore essential for the petitioner to hold separate meetings between the different classes of creditors. In the present case, on 10 September 2004 the petitioner had convened only one creditors meeting grouping the petitioner's secured creditors, unsecured creditors together with the petitioner's subsidiaries. The amount purportedly owing to the petitioner's subsidiaries is more then 50% of the total debts owed by the petitioner. The court is of the view that it would be highly unfair to group the petitioner's subsidiaries in the same class of creditors with the petitioner's unsecured creditors as there is a divergence of interest between the petitioner's subsidiaries and the other unsecured creditors and that both these classes of creditors will not be able to consult together with a view to their common interests. It is undeniable that the petitioner having full control of the subsidiaries would cause the subsidiaries to vote in support of the Scheme. There is no community of interests such in so far as the subsidiaries and the other creditors are concerned.

By lumping the subsidiaries with the other creditors, the petitioner had effectively deprived the other creditors of a meaningful voice in the voting for the Proposed Scheme depriving the other creditors of heir legitimate rights against the petitioner.

(In *Re Hellenic & General Trust (supra)* it was held by Templeman J at p. 386 that:

> if the parent controls 50 percent or more of the shares of the subsidiary company it can be assumed that they have a community of interest.

In any event, the petitioner has a right of indemnity against the subsidiaries for debts arising from corporate guarantees executed by the petitioner for loans granted to the subsidiaries. As such, the petitioner has a right of set-off against the subsidiaries for the bulk of the alleged debts. As such, the interests of the subsidiaries and that of the other creditors of the petitioner cannot by any stretch of imagination be said to be common.

In *UDL Holdings Ltd. and Others* [2002] 1 HKC, 172, Lord Millett NPJ (giving the judgment of the Court of Final Appeal in Hong Kong) held as follows:

> Normally the Courts acts on the principle enunciated by Lindley LJ in *Re English, Scottish & Australian Chartered Bank* [1893] 3 Ch 385 at 409 and regard businessmen as much better judges of what is to their commercial advantage than the Court could be. But this assumes that they are voting in what they honestly believe to be the interests of the class of which they are members. But this may not be the case if they have some private interest of their own which is not shared by other members of the class. As Adam J explained in *Re Chevron (Sydney) Ltd* at p 255:
>
> > The true position appears to be that where the members of a class have divergent interests because some have and others have not interests in a company other than as members of the class the Court may treat the result of the voting at the meeting of the class as not necessarily representing the views of the class a such, and thus should apply with more reserve in such a case the proposition that the members of the class are better judges of what is to their commercial advantage than the Court can be. In so far as members of a class have in fact voted for a scheme not because it benefits them as members of the class but because it gives them benefits in some other capacity, their votes would of course, in a sense, not reflect the view of the class as such although they are counted for the purposes of determining whether the statutory majority has been obtained at the meeting of the class.

Lord Esher MR in *Sovereign Life Assurance Co. v. Dood (supra)* said:

> ... they must be divided into different classes ... because the creditors composing the different classes have different interest; and therefore, if we find a different state of facts existing among different creditors which may differently affect their minds and their judgment, they must be divided into different classes.

Being a parent company, the petitioner controls the subsidiaries. They have a community of interest and therefore would act in concert to get the Proposed Scheme approved and implemented. Their inter company balances are eliminated on consolidation. Unlike other ordinary creditors, the subsidiaries

would not have taken legal action against the petitioner to the point of liquidation in order to collect their debts from the parent company, the petitioner. Therefore, it is manifestly unfair to include the subsidiaries votes together with the other creditors for the purpose of the Proposed Scheme.

KWSP Deduction And Income Tax

There is no specific provisions made under the Proposed Scheme in relation to KWSP deduction and income tax of the employees. The fact that the failure to pay over the deduction of KWSP contributions and income tax of the employees of the petitioner is or are criminical offences under s. 43(3) of the Employees Provident Fund Act 1991 and s. 112(i) of the Income Tax Act 1967 respectively, requires them to be paid by the petitioner in preference to all other unsecured creditors and therefore, the KWSP and LHDN are without doubt "preferential creditors" regardless of whether the petitioner is under receivership or liquidation or subjected to restructuring under s. 176 of the Companies Act 1965 or even operating normally as a going concern. They should rank in priority over the other unsecured creditors. Under the Proposed Scheme, both the KWSP and LHDN have been treated as ordinary unsecured creditor and have been accorded the same treatment (parri pasu) as other unsecured creditors ie, to get 6.5 sen for every Ringgit of KWSP contribution for the employees and income tax respectively. The petitioner argued that although there is a requirement to treat certain debts as preferential in a winding-up, this provision is not applicable for a scheme under s. 176 of the Companies Act 1965. As such, the petitioner submitted that both the KWSP and LHDN will rank parri pasu with the other unsecured creditors of the petitioner under the Proposed Scheme.

The petitioner argued that both the KWSP and LHDN may still claim the balance of the debt owing to them from the previous management of the petitioner, ie, the previous directors, who were responsible at the material time for allowing such lapses of non-payment to the respective statutory bodies.

With respect the court cannot accept such arguments by the petitioner. Payment for KWSP contributions and Income tax is statutory requirements under the Employees Provident Fund Act 1991 and The Income Tax Act 1967 respectively.

The present management of the petitioner being successors of the previous management which is continuing and therefore they inherit exclusively the rights and responsibilities to properly manage the petitioner notwithstanding any alleged previous mismanagement. Therefore, they are obliged to make full payments to the two statutory bodies (KWSP and LHDN) out of whatever funds that can be generated within the group without arbitrarily pushing the

blame to the previous management who currently do no have any access or control over the assets and affairs of the petitioner. A company is an entirely in law and exists in perpetuity unless dissolved. Any changes in management would not entirely changes of its obligations under the law. Therefore the new management should ensure compliance under the law. Therefore, before the court can approve the said Proposed Scheme, the court has to be fully satisfied that sufficient provisions be made for these two payments ie, deduction for KWSP contributions and Income tax. In the present case, the Proposed Scheme failed to provide for such provisions.

Invalid Proxies

In the creditors meeting on 10 September 2004 there is evidence to show that the Chairman had voted as proxy for a bankrupt ie, one Mohamad Isa bin Mohamad Nordin (listed as creditor no: 36 on the Attendance List of the creditors meeting) without the prior sanction of the Director-General of Insolvency. Similarly, one Arunan a/l Tharumaseelan had also voted as proxy for a bankrupt ie, one Dato' Mohd Haji Mohamad Nordin (listed as creditor no: 28 on the Attendance List of the creditors meeting) without prior sanction of the Director-General of Insolvency. It is settled law that a bankrupt is not entitled to exercise any rights as a creditor without the prior approval of the Director-General of Insolvency. In view of the above, the court holds that the proxies were invalid and thus it also affects the validity of the creditors meeting.

In addition, one Development Securities Sdn. Bhd. one of the participating subsidiaries which had been wound-up on 30 June 2004 is under liquidation and would not be entitled to vote at the creditors meeting unless by leave of the official receiver or represented by a Provisional Liquidator, but most definitely not by the petitioner or any of its officers.

Conclusion

From the above considerations, it is evident that the creditors meeting held on 10 September 2004 was not properly called and convened. Therefore the court holds that the said creditors meeting is null and void. In the premise, the Proposed Scheme cannot be approved by the court as petitioned by the petitioner. Therefore, the petition is dismissed with costs. The court further holds that in the event the petitioner is still interested to proceed with a scheme of restructuring, fresh meetings of creditors must be convened after taking into consideration all the flaws which had been highlighted above.